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IN THE

Supreme Court of the United States

October Term, 1964

No. 251

FRANK URSICH,

Petitioner,

vs.

MANUEL G. DA ROSA, ANTONIO GARCIA DA ROSA, MARIA A. ROSA, VICTORINO GARCIA DE ROSA, and MARY ROSA SANTOS,

Respondents.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI.

I.

The Doctrine of Res Ipsa Loquitur Is Not Applicable in Every Case.

It is a fundamental rule of tort law, that the burden of proving defendant's negligence is upon the plaintiff. In certain cases, plaintiff is aided in this burden by the doctrine of *res ipsa loquitur*; but this occurs *only in certain cases.*

The determination of which cases call for the application of the doctrine and which do not has been the subject of innumerable opinions from all jurisdictions and the subject of numerous articles and treatises.

From these opinions and treatises has arisen a set of conditions which are to be met for the doctrine to apply. Some jurisdictions require more of these conditions than others; however, running through all of the decisions and discussions are certain basic considerations.

Where the circumstances surrounding the accident, by their very nature, indicate its cause was more likely than not a result of negligence [*Bedal v. Hallack and Howard Lumber Company*, 226 F. 2d 526 (9th Cir. 1955); *Berryman v. Bayshore Construction Company*, 207 Cal. App. 2d 331, 333 (1962).], the instrumentality causing the injury was in the exclusive control of the defendant [*Bedal v. Hallack and Howard Lumber Company, supra*], and the occurrence is otherwise unexplained [*Manhat v. United States*, 220 F. 2d 143, 146 (2d Cir. 1955), *cert. den.*, 349 U. S. 966 (1955)], one's common sense leads him to infer the accident was somehow the result of the defendant's negligence. See *Gillen v. United States*, 281 F. 2d 425 (9th Cir. 1960); Prosser, *Res Ipsa Loquitur in California*, 37 Cal. L. Rev. 183, 184-85 (1949).

Where these conditions exist and the facts surrounding the accident are more easily available to the defendant than to the plaintiff, the latter is aided in his proof by the doctrine. [*Bedal v. Hallack and Howard Lumber Company, supra*, at 538; 9 Wigmore, *Evidence*, Section 2509 (1940). See Note 12, page 16 of Petitioner's Petition.]

Any relaxation of the requirement that the above conditions exist would have a twofold effect: first, the basic, logical reason for the doctrine would cease to

exist; and, second, the doctrine would become merely a device by which the plaintiff in virtually every case would be required to show only the happening of an accident to establish a *prima facie* case.

As was pointed out by Justice Frankfurter in his dissenting opinion in *Johnson v. United States,* 333 U. S. 46, 55-56 (1948), accidents such as the one which formed the basis for the instant suit are inherent in industrial employment and recovery therefor should be based on a system of workmen's compensation laws, not on a finding of fault. In the absence of such a system, Petitioner's right to recovery is dependent upon his proving the accident was a proximate result of fault on the part of his employers [*De Zon v. American President Lines,* 318 U. S. 660 (1943).].

So long as this situation exists, the mere happening of an accident does not give rise to a right to recovery. The basic, existing foundations of our system of tort law should not be diluted to make it otherwise.

II.

The Doctrine of Res Ipsa Loquitur Is Not Applicable to This Case.

A. The Facts Surrounding the Accident Were Not Better Known or More Easily Available to Respondent Than to Petitioner.

There are only two persons who have knowledge of the facts surrounding the cause of the accident in controversy: Petitioner and his working partner, Druskovich. Both of these persons were produced at the trial of this cause and were subjected to direct and cross-examination. Druskovich was available to Petitioner and his attorneys before the trial; in fact, ex-

perience indicates fellow crewmembers are far more accessible to plaintiff seamen and their attorneys than to defendant shipowners.

This is not a situation where the facts surrounding the accident are either better known or more easily available to the defendant than to the plaintiff. There is no necessity for aiding Petitioner in his proof in this case. The very reason for invoking the doctrine of *res ipsa loquitur* does not exist here.

B. The Cause of the Subject Injury Is Not More Likely Than Not the Result of Negligence.

The testimony at the trial of this case disclosed three possible reasons for the hook having pulled from the eye of the fish being handled by Druskovich: (1) The fish's eye was soft; (2) The bones of the fish broke; or (3) The hook broke.

It is apparent the hook did not break, for had it done so, this would have been known. The absence of this possibility was conceded by Petitioner by his choosing not to proceed on a theory of breach of warranty of seaworthiness.

The inference raised by the evidence in this case, including the testimony of Petitioner, is one of absence of negligence. Petitioner testified that Druskovich was a good and experienced fisherman [Tr. p. 74] and was handling the fish in the usual and proper manner [Tr. pp. 87, 88]. In answer to the question "Would you conclude that Vido was careless?", Petitioner stated "No, no, I can't say . . .", at which time he was interrupted by his attorney [Tr. p. 91]

Petitioner has stated that the evidence confirmed rather than rejected negligence (Petition. p. 12). Were

Petitioner correct in this regard, he should have prevailed on such evidence without the necessity of invoking *res ipsa loquitur*. The jury, however, found otherwise. The actual finding of the jury that the accident *was not caused* by negligence certainly reaches farther than a finding it *probably* was not caused by negligence. The jury therefore would not have drawn the inference sought by Petitioner.

C. The Cause of the Accident Was Otherwise Explained.

Much of what has been said above relates as well to this point. Respondent quotes a portion of its brief to the Circuit Court of Appeals for the Ninth Circuit on this point:

> "It is clear from the evidence in this case that the fish which struck appellant was dropped by a fellow crewmember, Vido Druskovich, as a result of the hook with which Druskovich was lifting the fish pulling from the fish's eye.
>
> "There is accordingly no question as to *how* the accident occurred. It occurred when the fish being lifted by Druskovich 'got away from him' and fell onto appellant. There is likewise no question as to *why* the fish fell. It fell because the hook being used by Druskovich pulled from its eye.
>
> "Appellant, however, argues that this does not constitute a sufficient explanation of the occurrence; that it must further be affirmatively shown *why* the hook pulled from the fish's eye. We must suppose that if it were shown that the hook pulled from the eye because an adjacent bone in the head broke, appellant would then argue that the doctrine were still applicable because there was no positive showing as to *why* the bone broke. Appellant's

argument may be carried to the point where, unless and until every last minute detail of every aspect of a case is fully explained by the defendant, there is an inference of negligence. One need only attempt to answer the series of 'Why' questions posed by a pre-school child to realize the futility of the task this proposition would present.

"The doctrine has been applied only in those situations where the reason the accident occurred was not explained. Such a case is *Johnson v. United States*, 333 U.S. 46 (1948), cited by appellant. This case involved a block which was dropped on libelant. The man who dropped the block was not produced as a witness, and it is apparent little or no effort was made to explain how or why the block was dropped. We know of no decision applying the doctrine where, as in the present case, the reason the accident occurred is explained." (Appellee's Brief below, pp. 2-3.)

III.

Petitioner's Proposed Instruction Incorrectly Stated the Doctrine and Effect of Res Ipsa Loquitur.

The instruction proposed by Petitioner is set forth in Note 2, on page 5 and at page 3 of Appendix A of the Petition and will not be repeated here. The clear, unmistakable import of this instruction is that the jury would be *required* to find for the plaintiff in the absence of contrary evidence sufficient to meet or balance the inference of negligence raised by the doctrine.

In *Sweeney v. Erving*, 228 U. S. 233, 240 (1913), a decision which was later described in *Jesionowski v. Boston & Maine R.R.*, 329 U. S. 452, 457 (1947) as

having "cut through the mass of verbiage built up around the doctrine of res ipsa loquitur", this Honorable Court announced:

> "In our opinion, *res ipsa loquitur* means that the facts of the occurrence warrant the inference of negligence, not that they compel such an inference; that they furnish circumstantial evidence of negligence where direct evidence of it may be lacking, but it is evidence to be weighed, not necessarily to be accepted as sufficient; that they call for explanation or rebuttal, not necessarily that they require it; that they make a case to be decided by the jury, not that they forestall the verdict. *Res ipsa loquitur*, where it applies, does not convert the defendant's general issue into an affirmative defense. When all the evidence is in, the question for the jury is whether the preponderance is with the plaintiff."

To hold otherwise would in effect raise what is clearly a permissible inference[1] to the level of a mandatory inference or a legal presumption. It would direct the jury to give greater effect to the inference than that given to other forms of circumstantial evidence.

A jury is free to accept or discard, believe or reject the testimony of witnesses or other evidence produced at a trial [*Lavender v. Kurn*, 327 U. S. 645 (1946)]. In a case, for example, where the only evidence is that

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[1] "The rule deals only with permissible inferences from unexplained events." *Johnson v. United States*, 333 U. S. 46, 49 (1948).

"*Res ipsa loquitur* as . . . applied in actions under the Federal Employer's Liability Act and other federal laws means no more than a permissible inference of negligence from the occurrence itself. It is simply one type of circumstantial evidence." *Texas and Pacific Railway Company v. Buckles*, 232 F. 2d 257, 263 (5th Cir. 1956), *cert. den.*, 351 U. S. 984 (1956).

introduced by the plaintiff, the jury would be free to disbelieve this evidence in its entirety and render a verdict against him. [*Calhoun v. Northeast Airlines, Inc.*, 180 F. Supp. 532 (S.D. N.Y. 1959) (see note 2, *infra*).]

Under the instruction requested by Petitioner, however. the jury would not be allowed to disregard the inference, but would be required to find for the plaintiff in the absence of other evidence. This is contrary to the weight of authority.[2]

It is respectfully submitted such a result would be contrary to the law as announced by this Court, contrary to the basic tenets of U.S. jurisprudence and contrary to the public interest.

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[2]"That this is no more than a permissible inference which the jury may but is not compelled to accept is the majority rule." *Bedal v. Hallack and Howard Lumber Company, supra*, at 539 (n.19).

"Plaintiff's attorneys would apply the doctrine of res ipsa loquitur as compelling an inference of negligence; they would give it the force of a presumption of negligence.

"However such is not the law. The doctrine, a rule of evidence, permits, but does not require, the trier of the fact to draw an inference of negligence.

"* * *

"Thus, even if a defendant rested upon a plaintiff's case and offered no explanation where plaintiff properly relied upon res ipsa loquitur, it would not follow that plaintiff would be entitled to a directed verdict as a matter of law. In short, the defendant has a right to remain silent, offer no explanation and, in that event, he would still be entitled to have the jury determine whether or not the inference of negligence is to be drawn from the happening of the accident under the circumstances." *Calhoun v. Northeast Airlines, Inc., supra* at 533.

"But the later cases, as we understand them, hold that the res ipsa loquitur doctrine means no more than that a plaintiff who brings himself within it makes a prima facie case which entitles him to go to the jury, but he must still persuade the jury that the defendant was negligent, even though the defendant has presented no explanation of the accident." *Century Indemnity Company v. Arnold*, 153 F. 2d 531, 532 (2d Cir. 1946), *cert. den.* 328 U. S. 854 (1946).

IV.

The Giving of Respondent's Instruction That No Inference of Negligence Could Be Drawn From the Mere Happening of the Accident Was Not Erroneous.

The instruction to which Petitioner objects reads as follows:

> "There mere fact that an accident happened, considered alone, does not as a rule permit the jury to draw the inference that the accident was caused by someone's negligence."

Petitioner contends that even if his *res ipsa loquitur* instruction was incorrect and therefore properly rejected, the jury could, under the rule announced in *Fassbinder v. Pennsylvania R.R. Co.*, 322 F. 2d 859 (3rd Cir. 1963), still conclude there was negligence on the basis of the doctrine. Petitioner further contends the subject instruction precluded the jury's so acting.

The fallacy in Petitioner's contentions is that, whether or not a *res ipsa loquitur* instruction were given, the jury could properly base its verdict on the doctrine only if the requisite conditions for its application existed. Given only the happening of the accident, and nothing more, the jury could not have properly found for him.

"It is axiomatic that the mere happening of an accident is not in itself proof of negligence." *Bedal v. Hallack and Howard Lumber Company, supra*, at 538.

The instruction therefore correctly states the law. Absent the requisites for the imposition of the doctrine of *res ipsa loquitur*, the thing does not speak for itself: The mere happening of the accident, in and of itself, does not infer negligence.

Conclusion.

Petitioner is seeking a ruling by this Court which would alter the basic nature and effect of the doctrine of *res ipsa loquitur*, changing it from a device whereby a logically founded inference may be drawn to aid the plaintiff in his proof in certain cases to a device for imposing a mandatory inference in virtually every case. The rule sought by Petitioner would remove the doctrine from its logical, reasonable foundations.

Justice and the preservation of a system of tort law which is the product of hundreds of years of experience and the labors of thousands of judicial minds require the verdict of the jury and the decisions of United States District Court and the Circuit Court of Appeals below be affirmed.

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